Supreme Court, U.S.
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No. 93-1022

In the Supreme Court of the United States

OCTOBER TERM, 1993

WESLEY M. REXROAT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether review of the probable cause to confine petitioner, conducted by an independent military commander within 48 hours of petitioner's detention, satisfied the Fourth Amendment principles announced by this Court in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991).

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-19a, is reported at 38 M.J. 292. The opinion of the Army Court of Military Review, Pet. App. 20a-42a, is reported at 36 M.J. 708.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 29, 1993. The petition for a writ of certiorari was filed on December 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (1988 & Supp. IV 1992).

STATEMENT

1. While facing punishment pursuant to Article 15, UCMJ, 10 U.S.C. 815,[1] for being absent from his unit without authority, petitioner again fled his unit without authority. PX 1, at 2. Petitioner's unauthorized absence ended on June 26, 1991, when military police apprehended him at the Pearl Harbor, Hawaii, Base Exchange attempting to steal approximately $700 worth of electronics equipment. *Ibid.* Petitioner remained in police custody until his commander, Major Williams, ordered him into pretrial confinement on June 27, 1991, in accordance with Rule 305(d) of the Rules of Courts-Martial (R.C.M.).[2] Pet. App. 3a, 21a.

On June 28, 1991, within 48 hours of petitioner's arrest, Lieutenant Colonel Randall, a unit commander not in petitioner's chain of command, conducted an independent review of the probable cause supporting petitioner's confinement. Tr. 195. Colonel Randall had no prior knowledge of the case and was not involved in the investigation or prosecution of petitioner. Pet. App. 3a-4a. At

[1] Article 15, UCMJ, authorizes commanders to impose nonjudicial punishment on soldiers for minor offenses. Punishment may consist of, *inter alia*, a reduction in rank, temporary forfeiture of a portion of pay, geographic restriction, and performance of extra duty.

[2] R.C.M. 305(d) provides as follows:

> *When a person may be confined.* No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:
>
> (1) An offense triable by court-martial has been committed;
>
> (2) The person confined committed it; and
>
> (3) Confinement is required by the circumstances.

trial, petitioner did not challenge Colonel Randall's neutrality and impartiality. Indeed, he stipulated at trial that Colonel Randall "conducted a `neutral and detached review of probable cause to place [petitioner] in pretrial confinement' [and] concluded that probable cause to believe [petitioner] committed UCMJ offenses existed." AX 5, at 1; Tr. 184; Pet. App. 4a, 21a.

Major Williams subsequently reviewed petitioner's confinement in accordance with R.C.M. 305(h).[3] In a

[3] R.C.M. 305(h) provides, in pertinent part, as follows:

Notification and action by commander.

(1) *Report.* Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer to whose charge the prisoner was committed shall, within 24 hours after that commitment, cause to be made a report to the commander which shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

(2) *Action by commander.*

(A) *Decision.* Not later than 72 hours after ordering a prisoner into pretrial confinement, or after receipt of a report that a member of the commander's unit or organization has been confined, the commander shall decide whether pretrial confinement will continue.

(B) *Requirements for confinement.* The commander shall direct the prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;

(ii) The prisoner committed it; and

(iii) Confinement is necessary because it is foreseeable that:

written memorandum dated July 3, 1991, he found both probable cause and a need for continued confinement. Pet. App. 4a. Then, also on July 3, 1991, Major Hudson, a military magistrate, conducted a hearing pursuant to R.C.M. 305(i).[4] Petitioner was represented by counsel at the hearing. Major Hudson found probable cause and determined that continued confinement was warranted as petitioner posed a demonstrated flight risk and other forms of restraint were inadequate. AX 5, at App. 3; Pet. App. 4a, 21a.

2. On August 1, 1991, Major S[illegible]een (Major Williams' successor in command) formally charged petitioner with attempted larceny, two specifications of absence without

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(*a*) The prisoner will not appear at a trial, pretrial hearing, or investigation, or

(*b*) The prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

* * * * *

(C) *Memorandum.* If continued pretrial confinement is approved, the commander shall prepare a written memorandum which states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. * * *

[4] Rule 305(i) reads, in pertinent part, as follows:

Procedures for review of pretrial confinement.

(1) *In general.* A review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement shall be made within 7 days of imposition of confinement.

(2) *By whom made.* The review under this subsection shall be made by a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned.

leave, and 41 specifications of uttering worthless checks, in violation of Articles 80, 86, and 123a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 886, and 923a. Pet. App. 4a, 20a. Petitioner pleaded guilty to the charges and was sentenced to a bad conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to the lowest enlisted rank.

Before the military judge, petitioner claimed that he was entitled to five days of additional confinement credit because he had been illegally confined for that period. He argued that the government had failed to provide a timely review of his pretrial confinement in accordance with the standards set forth by this Court in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991). Petitioner argued that a military magistrate's review pursuant to Rule 305(i) is the only means by which the government can satisfy its responsibilities under *Gerstein* and *McLaughlin*, and that the Rule 305(i) probable cause review by Major Hudson did not take place until July 3, seven days after petitioner was first confined. That determination was untimely under *McLaughlin*, petitioner argued, since it did not take place within 48 hours of his arrest. The trial judge rejected petitioner's argument, holding that the neutral and detached review of probable cause conducted by Colonel Randall within 48 hours of petitioner's confinement satisfied the *Gerstein-McLaughlin* requirement for a timely probable cause review. Tr. 195-196.

3. On September 22, 1992, a three-judge panel of the Army Court of Military Review held that, in order to satisfy the *Gerstein-McLaughlin* requirement of a timely review of probable cause to confine an accused pending trial, a review within 48 hours of confinement must be conducted by a military magistrate pursuant to R.C.M. 305(i). The government petitioned the Army

Court of Military Review for *en banc* reconsideration of the panel's ruling. The en banc court granted reconsideration, but then ruled, by a divided vote, that the panel was correct in holding that a magistrate's review under R.C.M. 305(i) is the only way to satisfy the 48-hour review requirement of *McLaughlin* as applied to the military justice system. Pet. App. 20a-42a.

4. The Judge Advocate General of the Army certified the case for review by the Court of Military Appeals pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. 867(a)(2) (Supp. IV 1992). The Court of Military Appeals then reversed the decision of the Army Court of Military Review. Pet. App. 1a-19a.

The Court of Military Appeals held that Colonel Randall conducted a neutral and detached probable cause review within 48 hours of petitioner's detention. Although that review did not satisfy R.C.M. 305(i), because Colonel Randall was not authorized by service regulations to conduct the R.C.M. 305(i) review, the court held that Colonel Randall's review "was not prohibited by law or regulation; was conducted within the time limits established by *McLaughlin*; and was therefore sufficient to satisfy *Gerstein* and *McLaughlin*." Pet. App. 3a.

The court explained that the probable cause determinations required by R.C.M. 305(d) and 305(h) can satisfy *Gerstein* and *McLaughlin*, provided the commander who conducts the review is neutral and detached and the review is conducted within 48 hours of confinement. Reasoning from its decisions holding that commanders could be "neutral and detached" for purposes of issuing search authorizations, Pet. App. 8a, the court held that a commander "is not *per se* disqualified to make the initial probable cause review required by *Gerstein*." Pet. App. 11a. Rather, the commander's determination is sufficient to satisfy *Gerstein* "if the commander is neutral

and detached, and can satisfy *McLaughlin* if conducted within 48 hours." *Ibid.* Accordingly, because the matter of probable cause to confine petitioner was reviewed within 48 hours of confinement by a neutral and detached officer, the Court of Military Appeals denied petitioner relief.[5]

ARGUMENT

1. Petitioner contends that the probable cause review conducted by Colonel Randall within 48 hours of petitioner's confinement was insufficient to satisfy the Fourth Amendment.

The Fourth Amendment requires that a person arrested without a warrant be given a prompt judicial determination of probable cause as a prerequisite to pretrial detention. That review can be conducted in a nonadversary proceeding, and on a written submission. *Gerstein* v. *Pugh*, 420 U.S. at 120. As this Court recently held, however, an initial probable cause determination is presumptively untimely if it is made more than 48 hours after arrest. *County of Riverside* v. *McLaughlin*, 111 S. Ct. at 1670.

In this case, it is undisputed that a probable cause review was conducted by Colonel Randall within 48 hours of petitioner's confinement. It is also undisputed that the probable cause review conducted by Colonel Randall was not the probable cause review provided for by R.C.M. 305(i). The question presented here is therefore a nar-

[5] The court did not find it necessary to make a determination whether Major Williams, the commanding officer who made the first probable cause determination under R.C.M. 305(d), was "neutral and detached," as it found that Colonel Randall, who made the second probable cause determination within 48 hours of petitioner's arrest, was sufficiently neutral and detached to satisfy Fourth Amendment standards.

row one—whether Colonel Randall was sufficiently neutral and detached to make a valid determination of probable cause for purposes of the Fourth Amendment.

a. Petitioner argues that, because Colonel Randall's probable cause review did not strictly comport with the procedures prescribed by Rule 305 of the Rules for Courts-Martial, it could not satisfy the 48-hour rule of *McLaughlin*. He argues that Rule 305 was intended to satisfy, *inter alia*, the requirement for a review of probable cause to confine as discussed by this Court in *Gerstein*. Accordingly, petitioner argues, the procedures found in Rule 305 are the exclusive means by which the government can satisfy *Gerstein* and *McLaughlin*.

The Court of Military Appeals properly rejected that argument and held that Rule 305 is not the only means by which the government can provide a prompt probable cause determination in accordance with the 48-hour rule of *McLaughlin*. Pet. App. 12a.[6] The Court observed that, although R.C.M. 305 was designed to comply with *Gerstein*,[7] the government is not thereby precluded from satisfying *Gerstein* and *McLaughlin* in other ways. Pet. App. 13a. Colonel Randall was not involved in the command's law enforcement function, and the Court of Military Appeals concluded that he was neutral and detached. *Id.* at 12a. Moreover, Colonel Randall's probable cause review was conducted within 48 hours of petitioner's detention. Accordingly, the probable cause determination

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[6] Rule 305 is a multi-tiered rule which provides for no less than three probable cause determinations, any one of which can satisfy *Gerstein* and *McLaughlin*, provided the determination is made by a neutral and detached officer within 48 hours of detention. See Pet. App. 11a.

[7] See Drafters' Analysis of Rule 305, *Manual for Courts-Martial, United States*—1984, at A21-14.2 (Change 3).

in the instant case complied fully with *Gerstein* and *McLaughlin*.[8]

b. Petitioner contends that military commanders should be *per se* disqualified from making probable cause determinations. He argues that commanders, solely by virtue of their status, are *de facto* law enforcement officials and, accordingly, incapable of being neutral and detached. That assertion runs contrary to both statutory and precedential authority.

This Court has consistently recognized that the military is a specialized society separate from civilian society. *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). Within that separate society, military officers, including nonjudicial officers, have long played significant roles in the administration of military criminal justice. *Weiss* v. *United States*, No. 92-1492 (Jan. 19, 1994), slip op. 7, 10. Some of those roles have involved issuing search authorizations, see Mil. R. Evid. 315; *United States* v. *Ezell*, 6 M.J. 307 (C.M.A. 1979); *United States* v. *Lopez*, 35 M.J. 35 (C.M.A. 1992); ordering the arrest or pretrial confinement of service members, see Article 9, UCMJ, 10 U.S.C.

[8] Colonel Randall's 48-hour review was conducted under the authority of a May 1991 directive from the Army Judge Advocate General, which instructed military legal officers that in the aftermath of *McLaughlin*, staff judge advocates "should ensure that pretrial confinement determinations are subject to a neutral and detached probable cause review within 48 hours." See Pet. App. 26a n.5. One of the methods devised to achieve that end was to have a "neutral and detached commander (not an accuser) * * * review the probable cause determination." *Ibid.* The directive made clear that the proposed methods for satisfying the *McLaughlin* 48-hour review requirement "are not intended as substitutes for review procedures currently required by the Manual for Courts-Martial [and other regulations]. They are offered only as suggestions to facilitate complying with the Supreme Court's 48 hour requirement." *Ibid.*

809; R.C.M. 304(b); and reviewing the propriety and necessity of continued confinement pending trial, see R.C.M. 305(h). When commanders have exercised those powers, the courts have demanded that they be neutral and impartial. See *United States* v. *Sharrock*, 32 M.J. 326, 333 (C.M.A. 1991) (Everett, S.J., concurring in part and dissenting in part); see also *United States* v. *Lopez*, *supra* (commander who is neutral and detached is entitled to the same judicial deference on appellate review as a military judge when appellate courts review a search authorization for probable cause). At the same time, the military courts have rejected the argument that military commanders are inherently part of the military law enforcement system and therefore cannot be sufficiently neutral and detached to make determinations such as the probable cause determination necessary to authorize a search in the military community. See Pet. App. 7a-8a (reviewing authorities).[9]

In light of the role of military officers in performing other, analogous functions in the military justice system, the Court of Military Appeals properly found no systemic error in permitting a military commander not in the defendant's chain of command to make a probable cause determination as to the legitimacy of his pretrial detention. Moreover, with respect to the specifics of petitioner's case, the Court of Military Appeals found noth-

[9] Although Colonel Randall was not a lawyer, that fact is without constitutional significance. This Court has held that a nonlawyer may be constitutionally qualified to determine whether there is probable cause to detain a person. *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972). The key to qualification is not whether the individual is a "judicial officer," "magistrate," "clerk," or other official, but whether the individual making the probable cause determination is "neutral and detached, and * * * capable of determining whether probable cause exists." *Id.* at 350.

ing in the record to suggest that Colonel Randall was not sufficiently neutral and detached to make a constitutionally valid probable cause determination. Indeed, the fact that each of the officers who examined the case before trial reached the same conclusion—including the military magistrate who made a probable cause determination five days later, and the fact that petitioner admitted his guilt of the charges against him, confirms that Colonel Randall's assessment of probable cause was correct. Accordingly, there is no reason for further review of the decision of the Court of Military Appeals, which holds that military commanders are not per se ineligible to make probable cause determinations that satisfy *Gerstein* and *McLaughlin*, while at the same time recognizing that any accused remains free to attack the probable cause determination of a reviewing officer on the basis that the officer who made the determination in his case was not neutral and detached.

2. Petitioner also argues (Pet. 12-14) that the Court of Military Appeals, by holding that Colonel Randall's probable cause review satisfied *Gerstein* and *McLaughlin*, engaged in an unlawful usurpation of presidential authority, as delegated by Congress, to prescribe pretrial, trial, and post-trial procedures. See Article 36, UCMJ, 10 U.S.C. 836 (1988 & Supp. IV 1992). That assertion is meritless.

The Court of Military Appeals did not hold that the government need not comply with the requirements of R.C.M. 305. Nor did the court promulgate new procedures to be substituted for those embodied in R.C.M. 305. Rather, the court simply determined that the additional probable cause review conducted in petitioner's case by Colonel Randall satisfied the requirements of *Gerstein* and *McLaughlin*. The opinion leaves intact, in their entirety, the requirements announced in the various sub-

sections of R.C.M. 305. It merely holds, in effect, that the Army Judge Advocate General did not violate any constitutional, statutory, or regulatory principles when authorizing commanding officers to conduct 48-hour probable cause reviews in the aftermath of *McLaughlin*, when probable cause determinations by military magistrates under Rule 305(i) could not be performed within the 48-hour period.

Petitioner's argument reduces to the claim that the *Gerstein-McLaughlin* rule must be satisfied by the particular procedures that have been set up to make probable cause determinations. Because Rule 305(i) was the means designed to satisfy the *Gerstein* probable cause requirement, and because the Rule 305(i) determination in this case was made well after the expiration of the 48-hour period prescribed in *McLaughlin*, petitioner suggests that it was somehow improper to satisfy the constitutional requirement by a procedure other than the one prescribed by existing rules. But that misapprehends what *Gerstein* and *McLaughlin* require: they are not designed to test the adequacy of the procedural rules in force in various jurisdictions; instead, they hold simply that an accused who is confined before trial is entitled to a probable cause review by a neutral and detached officer within 48 hours. Petitioner received such a review in this case; it is irrelevant to the Fourth Amendment, or any other constitutional right of the defendant, whether that review occurred within the aegis of Rule 305 or under the authority of a regulation designed to supplement Rule 305 in light of *McLaughlin*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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